

FROM BIRTH CONTROL TO EAGLE FEATHERS: HOW THE FIFTH CIRCUIT INCORRECTLY APPLIED THE SUPREME COURT'S REASONING IN *BURWELL V. HOBBY LOBBY* TO EAGLE FEATHERS

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INTRODUCTION

How far must the government go to accommodate an individual's religious practices? What happens when that accommodation clashes with other important values? A person wishes to participate in a religious ceremony by possessing eagle feathers. Under the Bald and Golden Eagle Protection Act ("Eagle Protection Act"),¹ only members of federally recognized Indian tribes ("FRT members") may possess eagle feathers.² Thus, persons who are not members of federally recognized tribes ("non-FRT members") are unable to claim an exception to the Eagle Protection Act and engage in religious practices that require eagle feathers.³

The Eagle Protection Act, enacted in 1940, prohibits possession of bald eagle and golden eagle parts and feathers and imposes penalties for violations.⁴ Yet several American Indian tribes use eagle feathers for cultural and religious purposes.⁵ Recognizing the importance of the government-to-government relationship between federally recognized tribes and the federal government, Congress in 1962 provided an exception to the prohibition on the possession of eagle parts and feathers "for the religious purposes of Indian tribes."⁶ The United States Fish and Wildlife Service ("FWS") interprets this exception as applicable only to members of federally recognized tribes.⁷ Thus, non-FRT members remain unable to legally possess eagle feathers for religious purposes.⁸

These persons denied an exception have attempted to use the Religious Freedom Restoration Act ("RFRA") to claim the same exception as FRT members.⁹ RFRA, enacted in 1993, provides that the federal government may not

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1. 16 U.S.C. § 668(a) (2012).

2. *Id.*

3. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 468-69 (5th Cir. 2014).

4. 16 U.S.C. § 668(a).

5. *McAllen Grace*, 764 F.3d at 468-69; *United States v. Wilgus*, 638 F.3d 1274, 1280 (10th Cir. 2011).

6. 16 U.S.C. § 668(a).

7. 50 C.F.R. § 22.22(a)(5) (2014).

8. *McAllen Grace*, 764 F.3d at 468-69; *Wilgus*, 638 F.3d at 1280.

9. *McAllen Grace*, 764 F.3d at 468; *Wilgus*, 638 F.3d at 1277.

“substantially burden a person’s exercise of religion.”¹⁰ Under RFRA, the government may substantially burden the exercise of religion only if the government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”¹¹

In 2011, the Tenth Circuit in *United States v. Wilgus* held that the Eagle Protection Act, by excluding non-FRT members, does not violate RFRA.¹² Three years later, on August 20, 2014, the Fifth Circuit in *McAllen Grace Brethren Church v. Salazar* found that RFRA does require a religious exception in the Eagle Protection Act for a broader class of persons.¹³ While the Tenth Circuit found that the government’s current regulation was the least restrictive means for furthering the government’s compelling interests,¹⁴ the Fifth Circuit found that the government had not met its burden of demonstrating that the government’s current regulation was the least restrictive means.¹⁵ One of the principle reasons for the Fifth Circuit’s departure was its dependence on the intervening decision of the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*¹⁶

The *Hobby Lobby* decision addressed a mandate to include contraceptive coverage in health plans under the Patient Protection and Affordable Care Act of 2010 (“ACA”) and reinforced the strict scrutiny analysis courts should apply when evaluating a RFRA claim.¹⁷ The Supreme Court reiterated that the standard courts should apply to determine whether a regulation is the least restrictive means of furthering the government’s compelling interest “is exceptionally demanding.”¹⁸ In *Hobby Lobby*, the very presence of an exception in the statute authorizing a waiver of the contraceptive mandate demonstrated that there was a less restrictive means for furthering the government’s compelling interests.¹⁹

The Fifth Circuit found the Supreme Court’s reasoning in *Hobby Lobby* regarding the significance of an exception to be dispositive.²⁰ The Fifth Circuit then reevaluated the Eagle Protection Act exceptions in light of *Hobby Lobby* to find that the exception for federally recognized tribes may not demonstrate a less restrictive means of advancing the government’s interests.²¹ However, the Fifth Circuit failed to recognize the differences between providing an exception for tribes based upon political and cultural considerations and providing an exception for classes of religious adherents based on individual beliefs. This Note examines

10. 42 U.S.C. § 2000bb-1(a) (2012).

11. *Id.* § 2000bb-1(b) (2012).

12. *Wilgus*, 638 F.3d at 1296.

13. *McAllen Grace*, 764 F.3d at 480.

14. *Wilgus*, 638 F.3d at 1296.

15. *McAllen Grace*, 764 F.3d at 480.

16. 134 S. Ct. 2751 (2014).

17. *Id.* at 2780.

18. *Id.*

19. *Id.* at 2781-82.

20. *McAllen Grace*, 764 F.3d at 472-73 (citing *Hobby Lobby*, 134 S. Ct. at 2782).

21. *Id.* at 477.

the flaws in the Fifth Circuit's reasoning in *McAllen Grace*.

Part I of this Note provides background on the Eagle Protection Act and RFRA. It examines the interplay between the two acts prior to *Hobby Lobby*, as demonstrated by *Wilgus*. It then examines *Hobby Lobby* and its implications, as applied in *McAllen Grace*.

Part II discusses the differences between the Fifth Circuit's decision in *McAllen Grace* and the Tenth Circuit's decision in *Wilgus*. It explains how the Fifth Circuit, by applying the reasoning from *Hobby Lobby*, arrived at a different conclusion than the Tenth Circuit. The Fifth Circuit should have examined how the limited supply of eagle feathers and Congress's efforts to recognize political and cultural duties in the Eagle Protection Act distinguishes *McAllen Grace* from *Hobby Lobby*.

Part III examines the compelling interests of the Eagle Protection Act and challenges the finding in *McAllen Grace* that the Eagle Protection Act violated RFRA. This Note argues that the Fifth Circuit in *McAllen Grace* incorrectly discounted the government's compelling interest in fulfilling responsibilities to federally recognized tribes as unique political and cultural entities. FWS regulations implementing the Eagle Protection Act's exception for "religious purposes of Indian tribes" interpret "Indian tribes" as federally recognized tribes. This interpretation is entitled to deference under *Chevron, U.S.A., Inc. v. National Resources Defense Council*.²² The Fifth Circuit should have performed a *Chevron* analysis to defer to FWS's determination that Congress enacted the exception in the Eagle Protection Act "for the religious purposes of Indian tribes" for political rather than religious reasons.

I. BACKGROUND

A. *The Eagle Protection Act*

Congress enacted the Eagle Protection Act in 1940 in an effort to protect and preserve the bald eagle.²³ Congress recognized that protecting bald eagles was a matter of conservational as well as cultural importance.²⁴ The enacting clause on June 8, 1940, provided, "the bald eagle is no longer a mere bird of biological interest but a symbol of the American ideals of freedom . . . and whereas the bald eagle is now threatened with extinction."²⁵ The Eagle Protection Act provides that it is illegal to "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles."²⁶ Violators of the act are subject to a fine of "not more than \$5,000 or imprisoned not more than one year

22. 467 U.S. 837 (1984).

23. Bald Eagle Protection Act, ch. 278, 54 Stat. 250 (1940).

24. *Id.*

25. 16 U.S.C. § 668 (2012).

26. *Id.* § 668(a).

or both.”²⁷

In 1962, the Eagle Protection Act was amended to add protections for the golden eagle as well as provide for exceptions to the prohibition on the taking, possession, and transportation of bald and golden eagle:

Whenever, after investigation, the Secretary of the Interior shall determine that it is compatible with the preservation of the bald eagle or the golden eagle to permit the taking, possession, and transportation of specimens thereof for the scientific or exhibition purposes of public museums, scientific societies, and zoological parks, *or for the religious purposes of Indian tribes*, or that it is necessary to permit the taking of such eagles for the protection of wildlife or of agricultural or other interests in any particular locality, he may authorize the taking of such eagles pursuant to regulations which he is hereby authorized to prescribe.²⁸

Pursuant to the amendments, FWS, under the authority of the Secretary of the Interior, drafted regulations providing for these exceptions.²⁹ The regulations were codified in section 22.22 of title 50 of the Code of Federal Regulations and provide a framework pursuant to which FWS issues permits for eagle parts for the religious purposes of federally recognized Indian tribes.³⁰

1. FWS Procedures to Legally Possess Eagle Feathers.—The process for an applicant to obtain a permit from FWS to possess eagle parts for religious purposes of Indian tribes is lengthy.³¹ The applicant must first prove membership in a federally recognized tribe by attaching “a certification of enrollment in an Indian tribe that is federally recognized under the Federally Recognized Tribal List Act of 1994.”³² FWS then considers if issuing the permit “is compatible with the preservation of the bald and golden eagle.”³³ To make that determination, FWS considers the “direct or indirect effect” of the permit on bald and golden eagle populations and “whether the applicant is an Indian who is authorized to participate in bona fide tribal religious ceremonies.”³⁴ FWS focuses on whether the tribal ceremony is “bona fide,” not whether an applicant’s religion is “bona fide.”³⁵

Once FWS approves a permit, it is forwarded to the National Eagle Repository (“Repository”) in Commerce City, Colorado.³⁶ The Repository

27. *Id.*

28. *Id.* (emphasis added).

29. 50 C.F.R. § 22.22(a)(5) (2014).

30. *Id.* § 22.22.

31. *Id.*

32. *Id.* § 22.22(a)(5).

33. *Id.* § 22.22(c).

34. *Id.* § 22.22(c)(1)-(2).

35. *Id.* § 22.22(c)(2).

36. Kyle Persaud, *A Permit to Practice Religion for Some but Not for Others: How the Federal Government Violates Religious Freedom When It Grants Eagle Feathers Only to Indian*

provides American Indians with parts of deceased eagles for religious purposes.³⁷ The Repository collects dead eagles, most often those that “have died as a result of electrocution, vehicle collisions, unlawful shooting and trapping, or from natural causes.”³⁸ The Repository then distributes the parts of the eagles to the next individual on the waiting list.³⁹ The wait for an applicant to receive the requested eagle parts is lengthy because of the large demand and limited supply.⁴⁰ The current wait to receive a whole eagle is three and a half years.⁴¹ For eagle feathers, the current wait is approximately six months.⁴²

2. *Problems in Obtaining a Permit.*—The Eagle Protection Act allows FRT members to obtain feathers for religious purposes, but it provides no exception for non-FRT members, even where they are religiously motivated.⁴³ Some of these persons are members of the more than 200 tribes that are not federally recognized⁴⁴ and others are not members of any tribe.⁴⁵ They may wish to practice their beliefs by possessing feathers of eagles, but they have no recourse under the Eagle Protection Act.⁴⁶

Some of those non-FRT members claim that the Eagle Protection Act violates their free exercise of religion by prohibiting them from possessing eagle feathers for their religious ceremonies.⁴⁷ They also claim the Eagle Protection Act violates RFRA.⁴⁸

B. RFRA

Congress enacted RFRA in 1993 “to provide very broad protection for religious liberty.”⁴⁹ RFRA provides greater protection for religious free exercise than the Free Exercise Clause in the First Amendment.⁵⁰ The Supreme Court has indicated that under the Free Exercise Clause, “neutral, generally applicable laws

Tribe Members, 36 OHIO N.U. L. REV. 115, 124 (2010).

37. *National Eagle Repository*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/mountain-prairie/law/eagle/> [<http://perma.cc/HX85-UJXF>] (last updated Jan. 10, 2010).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 470 (5th Cir. 2014).

43. *See id.* at 468-69; *United States v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011).

44. Alexa Koenig & Jonathan Stein, *Federalism and the State Recognition of Native American Tribes: A Survey of State-Recognized Tribes and State Recognition Processes Across the United States*, 48 SANTA CLARA L. REV. 79, 82 (2008); *see also McAllen Grace*, 764 F.3d at 468-69.

45. *See McAllen Grace*, 764 F.3d 465; *Wilgus*, 638 F.3d 1274.

46. *See McAllen Grace*, 764 F.3d at 472; *Wilgus*, 638 F.3d 1274.

47. *See McAllen Grace*, 764 F.3d at 468.

48. *See id.*

49. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014).

50. *Id.*

may be applied to religious practices even when not supported by a compelling governmental interest.”⁵¹

RFRA, however, provides that the federal government may not “substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.”⁵² If a court finds that a federal governmental action substantially burdens an individual’s exercise of religion, the court grants the individual an exception from the burdensome law.⁵³ The individual will not be granted an exception if the federal government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”⁵⁴

*C. Interplay Between the Eagle Protection Act and RFRA Prior to
Hobby Lobby as Demonstrated by Wilgus*

Samuel Ray Wilgus sought to possess eagle feathers for religious purposes, but he was not a member of a federally recognized tribe.⁵⁵ Although not born American Indian,⁵⁶ Wilgus became a “follower of a Native American Faith”⁵⁷ later in his life and was welcomed by members of the Southern Paiute Nation.⁵⁸ He ultimately became a “blood brother” after living with members.⁵⁹ Several members of the Southern Paiute Nation and members of other tribes gave eagle feathers to Wilgus for religious purposes and gifts.⁶⁰ Because Paiute law “does not permit the adoption of non-Native American persons,” he was never a formally recognized member of the tribe.⁶¹ He thus possessed the eagle feathers in violation of the Eagle Protection Act.⁶² He pleaded guilty to two misdemeanor counts due to his possession of 141 eagle feathers without a permit after he was pulled over for a traffic stop.⁶³ His feathers were confiscated and he received a penalty of twelve months probation and a \$50 fine.⁶⁴

After pleading guilty, Wilgus appealed what he viewed as a violation of his rights under RFRA.⁶⁵ In 2011, the Tenth Circuit in *Wilgus* evaluated whether

51. *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997).

52. 42 U.S.C. § 2000bb-1(a) (2012).

53. *Id.*

54. *Id.* § 2000bb-1(b).

55. *United States v. Wilgus*, 638 F.3d 1274, 1280 (10th Cir.2011).

56. *Id.*

57. *Id.* at 1277.

58. *Id.* at 1280.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

Wilgus's conviction violated RFRA.⁶⁶ The Tenth Circuit found that the Eagle Protection Act substantially burdened Wilgus's exercise of religion.⁶⁷ Because the court found that the Eagle Protection Act substantially burdened Wilgus's exercise of religion, the court was required under RFRA to determine whether the Eagle Protection Act exception for religious purposes of Indians applying solely to FRT members was "in furtherance of a compelling governmental interest; and [was] the least restrictive means of furthering that compelling governmental interest."⁶⁸ Before determining whether the existing interpretation was the least restrictive means, the court analyzed the government's compelling interests: (1) protecting eagles⁶⁹ and (2) "the protection of the culture of federally-recognized Indian tribes."⁷⁰ The court first accepted the government's argument that it had a compelling interest in the protection of bald and golden eagles.⁷¹ It recognized that protection of the bald and golden eagles is necessary to protect the national symbol of the bald eagle.⁷²

The court discussed in more detail the government's second compelling interest.⁷³ Instead of accepting the more general interest of protecting all Native American culture and religion, the court found the government's second compelling interest was in "protection of the culture of federally-recognized Indian tribes."⁷⁴ First, the court acknowledged that Congress has an "obligation of trust to protect the rights and interests of federally-recognized tribes and to promote their self-determination."⁷⁵ Second, the court found this formulation of the government's interest was consistent with the Eagle Protection Act.⁷⁶ The court indicated that Congress could have provided an exception for Native American religions, but instead provided an exception for "religious purposes of Indian tribes."⁷⁷ The court found that this indicated that Congress intended to protect the religious purposes of federally recognized tribes instead of Native American religion:

Congress specifically chose to tie the exception to 'Indian tribes,' rather than individual practitioners. From this [the court] infer[red] that Congress saw the statutory exception not as protecting Native American religion qua religion, but rather as working to preserve the culture and

66. *Id.* at 1274.

67. *Id.* at 1283-84.

68. *Id.* at 1279.

69. *Id.* at 1285.

70. *Id.* at 1285-86.

71. *Id.* at 1285.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 1285-86 (quoting *United States v. Hardman*, 297 F.3d 1116, 1128 (10th Cir. 2002) (en banc)).

76. *Id.* at 1286.

77. *Id.* (emphasis added).

religion of federally-recognized tribes.⁷⁸

The court found FWS's formulation to be consistent with the Supreme Court's recognition of the special relationship the federal government has with federally recognized tribes.⁷⁹ Quoting *Morton v. Mancari*, the court found a special obligation exists to federally recognized tribes because "Congress was empowered 'to single out for special treatment a constituency of tribal Indians.'"⁸⁰ Finally, the court found this formulation best because of its concern with an Establishment Clause problem if the government provided an exception to Native American religions rather than an exception for religious purposes of federally recognized tribes.⁸¹

Turning to the second RFRA question, the Tenth Circuit found that the existing regulatory structure was the least restrictive means of promoting the government's compelling interests.⁸² The court rejected two alternatives offered by Wilgus that he claimed were less restrictive than the absolute ban on possession: "opening the permitting process to all adherents of Native American Religion" and "allowing members of Tribes to give feathers to [non-FRT members] who practice Native American Religion."⁸³ The court found that the first alternative of allowing non-FRT members to obtain a permit "would likely not affect the government's compelling interest in eagle protection."⁸⁴ However, it would fail to advance the government's interest in protecting the culture and religion of federally recognized tribes.⁸⁵ If the permit process were opened up to all religious persons, then members of federally recognized tribes would be burdened with even longer wait times to receive their feathers.⁸⁶ There would also be enforcement problems with policing individuals and facing possible questions regarding their religious sincerity.⁸⁷

The court found that the second alternative of allowing tribe members to give feathers to non-members would likely not have an effect on eagle protection.⁸⁸ However, it would fail to advance the government's interest of protecting the

78. *Id.*

79. *Id.* (citing *Morton v. Mancari*, 417 U.S. 535, 537-39 (1974)).

80. *Id.* (quoting *Morton*, 417 U.S. at 552).

81. *Id.* at 1287.

82. *Id.* at 1295.

83. *Id.* at 1292-95.

84. *Id.* at 1292.

85. *Id.* at 1294.

86. *Id.* at 1293.

87. *Id.* The Supreme Court has been hesitant to allow the government to examine an adherent's sincerity of religion. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting); *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring) ("The risk that governmental approval of some [religions] and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.").

88. *Wilgus*, 638 F.3d at 1294.

culture and religion of federally recognized tribes.⁸⁹ The court found that this option would again create problems with wait times for FRT members and problems with enforcement.⁹⁰ The court thus held, unanimously, that the existing regulatory scheme was the least restrictive means of advancing both of the government's compelling interests, and the Eagle Protection Act did not violate RFRA.⁹¹

D. Hobby Lobby and its Implications as Applied in McAllen Grace

I. Hobby Lobby.—In the June 2014 case, *Hobby Lobby*, the Supreme Court was asked to determine whether the contraceptive mandate of the Patient Protection and Affordable Care Act of 2010 (“ACA”) violated RFRA when applied to a closely held corporation controlled by persons with religious beliefs in opposition to covered contraceptive.⁹² The ACA mandates that employers provide for women “all Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling.”⁹³ Included in these contraceptive methods were four alternatives that may prevent a fertilized egg from attaching to the uterus.⁹⁴ Health and Human Services (“HHS”) provides exceptions under this contraceptive mandate for religious employers, such as churches, and some religious nonprofit organizations.⁹⁵ HHS also provides exceptions for employers that provide “grandfathered health plans,” those existing and unaltered since March 23, 2010, and for employers that have fewer than fifty employees.⁹⁶

Constega Wood Specialties, Hobby Lobby, and Mardel, all closely held businesses owned by religious families, sued HHS claiming the contraceptive mandate violated RFRA.⁹⁷ The families who owned the three for-profit businesses asserted that providing certain contraceptives to their employees would violate their religious beliefs.⁹⁸

The Supreme Court found that the absence of an exception for religious purposes of closely held businesses imposed a substantial burden on the businesses' religious beliefs.⁹⁹ After finding a substantial burden, the Court considered whether HHS demonstrated that the mandate: “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of

89. *Id.* at 1295.

90. *Id.* at 1294.

91. *Id.* at 1296.

92. *Hobby Lobby*, 134 S. Ct. at 2785.

93. *Id.* at 2762.

94. *Id.*

95. *Id.* at 2763.

96. *Id.* at 2764.

97. *Id.* at 2764-66.

98. *Id.* at 2766.

99. *Id.* at 2779.

furthering that compelling governmental interest.”¹⁰⁰ On the first question, the Court “assumed” that providing contraceptives to women without cost sharing was a compelling interest, finding it “unnecessary to adjudicate this issue.”¹⁰¹

On the second issue, the Court found that HHS failed to satisfy the least restrictive means test.¹⁰² HHS failed to show that the plaintiffs’ proposed alternatives to providing these contraceptives would not further HHS’s goals.¹⁰³ The Court found this to be evidence that “HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs” by providing an exception for religious organizations and religious non-profit organizations.¹⁰⁴ Thus, the Court held that the contraceptive mandate of the ACA violated RFRA, as HHS did not show that its regulation was the least restrictive means of furthering its compelling interests.¹⁰⁵

2. *McAllen Grace*.—The Fifth Circuit decided *McAllen Grace* less than two months after *Hobby Lobby* and relied heavily on the Supreme Court’s RFRA analysis.¹⁰⁶ *McAllen Grace* involved two non-FRT members wishing to possess eagle feathers for religious purposes.¹⁰⁷ They were found in possession of eagle feathers at a religious powwow and charged with violating the Eagle Protection Act.¹⁰⁸ One of the accused, Robert Soto, was a member of the Lipan Apache Tribe, which is not federally recognized.¹⁰⁹ The second accused, Michael Russell, was not a member of a tribe, but participated in American Indian religious ceremonies.¹¹⁰ While Soto and Russell participated in a religious powwow ceremony, a federal agent seized eagle feathers in their possession and charged them with unlawful possession of bald and golden eagle feathers without a permit.¹¹¹ After paying a fine and unsuccessfully petitioning FWS for the return of their feathers, Soto and Russell filed suit in the United States District Court for the Southern District of Texas challenging the Eagle Protection Act under RFRA.¹¹²

The district court granted summary judgment for the government, finding the Eagle Protection Act did not violate RFRA.¹¹³ The court found that FWS’s application of the Eagle Protection Act was the least restrictive means of

100. *Id.* (quoting 42 U.S.C. § 2000bb-1(b) (2012)).

101. *Id.* at 2780.

102. *Id.*

103. *Id.*

104. *Id.* at 2782.

105. *Id.* at 2785.

106. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014).

107. *Id.*

108. *Id.* at 468.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 469.

113. *Id.*

furthering the government's compelling interest.¹¹⁴ The Fifth Circuit reversed the district court's grant of summary judgment and remanded the case to determine whether FWS is able to show that its current permitting scheme does not violate RFRA.¹¹⁵ The Fifth Circuit found the government did not carry its burden of demonstrating that the FWS permit regulation does not violate RFRA.¹¹⁶

In beginning its RFRA analysis, the Fifth Circuit recognized that the Eagle Protection Act did substantially burden Soto and Russell's religion.¹¹⁷ The court then "assumed" the government's compelling interests were the same as in *Wilgus*: (1) protecting eagles and (2) "fulfilling responsibilities to federally recognized tribes."¹¹⁸ As the Tenth Circuit had in *Wilgus*, the Fifth Circuit accepted, with little comment, that protecting bald eagles and golden eagles was a compelling interest "because of [the eagle's] status as our national symbol, regardless of whether the eagle still qualifies as an endangered species."¹¹⁹ The court also recognized that "the Supreme Court has suggested that protecting migratory birds in general might qualify as a compelling interest."¹²⁰

In contrast to the Tenth Circuit, the Fifth Circuit did not completely accept, but assumed for the purposes of the RFRA analysis, the government's second compelling interest in fulfilling the government's unique responsibility to federally recognized tribes.¹²¹ The fact that "Congress did not define 'Indian tribes' in [16 U.S.C. § 668a], and the fact that the Department's approach has not been entirely uniform on this, [the court could not] definitively conclude that Congress intended to protect only federally recognized tribe member's religious rights in this section."¹²² The court rejected the government's argument that the unique relationship between the government and federally recognized tribes justifies granting religious exceptions only to these tribes.¹²³

After "assuming" that protecting eagles and the relationship of the government and federally recognized tribes were compelling interests, the Fifth Circuit found that the government failed to demonstrate "that there are no other means of enforcement that would achieve the same goals."¹²⁴ The court relied heavily on the Supreme Court's reasoning in *Hobby Lobby* to hold that the government failed to meet its burden of proving that the Eagle Protection Act is

114. *Id.* at 468.

115. *Id.* at 480.

116. *Id.*

117. *Id.* at 472.

118. *Id.* at 475, 478.

119. *Id.* at 473.

120. *Id.* (citing *Missouri v. Holland*, 252 U.S. 416, 435 (1920)). The Supreme Court in *Holland* more than suggested that protecting migratory birds is a compelling interest. Justice Holmes noted that migratory birds were "a national interest of very nearly the first magnitude." *Holland*, 252 U.S. at 435.

121. *McAllen Grace*, 764 F.3d at 473-75.

122. *Id.* at 473.

123. *Id.* at 474.

124. *Id.* at 477.

in furtherance of the government's compelling interests by the least restrictive means: "Recent Supreme Court cases . . . have reaffirmed that the burden on the government in demonstrating the least restrictive means test is a heavy burden."¹²⁵ In explaining the government's burden, the court provided that "the Department must provide *actual evidence*, not just conjecture, demonstrating that the regulatory framework in question is, in fact, the least restrictive means."¹²⁶ The court stated that "the very existence of a government-sanctioned exception to a regulatory scheme that is purported to be the least restrictive means can, in fact, demonstrate that other, less restrictive alternatives could exist."¹²⁷

The government argued that providing exceptions to non-FRT members would harm the compelling interest of protecting eagles.¹²⁸ However, the court rejected that these exceptions would weaken enforcement aimed at preventing the illegal trade of eagle parts and that enforcement would be disadvantaged by the lack of methods to verify an individual's heritage.¹²⁹ The court found first that the government provided no evidence that allowing broader exceptions would increase illegal poaching because "it is not necessary for an eagle to die in order to obtain its feathers."¹³⁰ Second, the government was relying on interviews with American Indians to determine whether the feathers in their possession were legal.¹³¹ Third, the government did not offer evidence that the black market would grow if the government broadened the exceptions.¹³² Fourth, the broad exception in the Eagle Protection Act allowing permits for "other interests" suggested that a broad religious exception would not be adverse to its goals.¹³³ Fifth, the government had not carried its burden in demonstrating there are no other methods to accomplish the same goals.¹³⁴ Finally, the court rejected the government's argument that enforcement agents would have to be "religious police" if a broad exception were permitted because there is no evidence that these individuals would not be able to prove their religious purpose.¹³⁵

The court also found that the government did not demonstrate how allowing individuals with sincere religious beliefs to possess eagle feathers would threaten the government's interest in fulfilling its responsibilities to federally recognized tribes.¹³⁶ The court rejected the government's argument that broadening the

125. *Id.* at 475 (citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780-82 (2014); *McCullen v. Coakley*, 134 S. Ct. 2518, 2540 (2014)).

126. *Id.* at 476 (citing *Hobby Lobby*, 134 S. Ct. at 2780-81) (emphasis in original).

127. *Id.* at 475.

128. *Id.* at 477.

129. *Id.* at 476.

130. *Id.*

131. *Id.*

132. *Id.* at 477 ("[I]t is also possible to hypothesize that the black market exists precisely because sincere adherents to American Indian religions cannot otherwise obtain feathers.").

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 478.

exception would increase the time an FRT member must wait to receive a feather.¹³⁷ The court found that the government had not provided specific evidence demonstrating the number of individuals wishing to possess eagle feathers for religious purposes that will apply for a permit if it broadens the exception.¹³⁸ The court also found that the wait times result from the government's creation of an inefficient permitting system and that the government cannot develop an inefficient system and then fail to accommodate because of those inefficiencies.¹³⁹ In the court's view, the government did not demonstrate that alternatives offered by the plaintiffs, "collecting molted feathers from zoos or allowing tribes to run aviaries," would not achieve its goals.¹⁴⁰

Because the government did not demonstrate that the existing regulation was the least restrictive means of furthering its compelling interests, the court reversed the grant of summary judgment for the government and remanded for the government to better develop its records.¹⁴¹

II. DIFFERENCES BETWEEN *WILGUS* AND *MCALLEN GRACE*

The Tenth Circuit decided *Wilgus* in 2011¹⁴² and the Fifth Circuit decided *McAllen Grace* only three years later in 2014.¹⁴³ Although both decisions considered whether the Eagle Protection Act violated RFRA by prohibiting non-FRT members from possessing eagle feathers, the circuits decided the issue differently.¹⁴⁴ The facts of the cases differ slightly, but materially, they involve analogous claims.¹⁴⁵

A. *The Plaintiffs and the Courts' Understanding of the Compelling Interests*

One of the most significant differences between the cases is the identity of the challengers and how the courts viewed the government's compelling interests. In *Wilgus*, the challenger to the Eagle Protection Act was a person, who was not a member of any tribe, wishing to possess eagle feathers for religious purposes.¹⁴⁶ *McAllen Grace* primarily involved a member of a non-federally recognized tribe, as well as a person wishing to possess eagle feathers for religious purposes not a member of any tribe.¹⁴⁷ When the Fifth Circuit discussed the government's interest in protecting the culture and religion of federally recognized tribes, the court stated that it could not "definitively conclude that Congress intended to

137. *Id.* at 478-79.

138. *Id.* at 478.

139. *Id.* at 479.

140. *Id.*

141. *Id.* at 480.

142. *United States v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011).

143. *McAllen Grace*, 764 F.3d 465.

144. *Id.* at 480; *Wilgus*, 638 F.3d at 1274.

145. *McAllen Grace*, 764 F.3d 465; *Wilgus*, 638 F.3d 1274.

146. *Wilgus*, 638 F.3d at 1277.

147. *McAllen Grace*, 764 F.3d at 468.

protect only federally recognized tribe members' religious rights."¹⁴⁸ The court recognized that the Texas Senate has acknowledged the Lipan Apache Tribe as having a "government to government" relationship with Texas.¹⁴⁹

Based on the evidence provided by the government, the Fifth Circuit was not convinced the government had a compelling interest in only protecting the relationship with federally recognized tribes and not with all American Indians.¹⁵⁰ The court questioned whether the plaintiffs fell within the class of persons the Eagle Protection Act was designed to protect and thus expanding the Eagle Protection Act to include them would actually continue to advance the government's compelling interest.¹⁵¹ Quoting *United States v. Hardman*, the court considered that "[a]llowing a wider variety of people to participate in Native American religion could just as easily *foster* Native American culture and religion by exposing it to a wider array of persons."¹⁵²

This understanding of the government's compelling interest in protecting the religion and culture of all who practice a religion of American Indians differs from the Tenth Circuit's understanding of the compelling interest in *Wilgus*.¹⁵³ The Tenth Circuit in *Wilgus* explicitly rejected a "general protection of Native American Religion."¹⁵⁴ Instead, the Tenth Circuit found there was a compelling interest in the protection of the culture and religion of only federally recognized tribes.¹⁵⁵ The court discussed at length the importance of protecting the unique government-to-government relationship the federal government has with federally recognized tribes.¹⁵⁶ Because Congress included the exception for the "religious purposes of *Indian tribes*" and not for individuals, the Tenth Circuit found that "Congress saw the statutory exception not as protecting Native American religion qua religion, but rather as working to preserve the culture and religion of federally-recognized tribes."¹⁵⁷ The court viewed the exception for federally recognized tribes as political instead of religious.¹⁵⁸ Thus, the Tenth Circuit found that including non-FRT members would fail to advance the government's interest

148. *Id.* at 473.

149. *Id.* This understanding is in contrast to the Supreme Court's understanding of the relationship between the federal government and Indian tribes. *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831). The Supreme Court in *Cherokee Nation* noted that the "relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else." *Id.* Thus, the federal government recognizing Indian tribes imposes a special duty to Indian tribes that state recognition does not.

150. *McAllen Grace*, 764 F.3d at 475.

151. *Id.* at 473.

152. *Id.* at 472 (quoting *United States v. Hardman*, 297 F.3d 1116, 1133 (10th Cir. 2002) (en banc) (emphasis in original)).

153. *United States v. Wilgus*, 638 F.3d 1274, 1285-88 (10th Cir. 2011).

154. *Id.* at 1287.

155. *Id.* at 1287-88.

156. *Id.* at 1285-88.

157. *Id.* at 1286 (emphasis added).

158. *Id.* at 1287-88.

in protecting its unique government-to-government relationship with federally recognized tribes.¹⁵⁹ This distinction is critical.

As a result of viewing the government's compelling interest to tribes differently, the courts in the two cases reviewed the proposed alternatives differently. The Tenth Circuit in *Wilgus* considered two alternatives: (1) expanding the Repository permitting process to all persons wishing to possess eagle feathers for religious purposes and (2) "allowing tribal members who lawfully possess eagle parts to give those parts as gifts to non-tribal-members who are nevertheless sincere practitioners."¹⁶⁰ The Tenth Circuit rejected both of these alternatives as failing to advance the government's compelling interests.¹⁶¹

The Fifth Circuit in *McAllen Grace* also considered whether the government's argument that expanding the Repository permitting process to all persons wishing to possess eagle feathers for religious purposes would be less restrictive.¹⁶² Unlike the Tenth Circuit, the Fifth Circuit found that the government failed to show in the summary judgment stage that this was not a "viable alternative."¹⁶³ The Fifth Circuit first found that expanding the permitting process would not increase poaching because an eagle does not have to die for non-members to possess its feathers.¹⁶⁴ Second, the court found that the expansion would not threaten the enforcement of the Eagle Protection Act because enforcement agents would continue to interview persons who possess the eagle feathers to determine the legality of the feathers.¹⁶⁵ Third, the court did not agree with the government's argument that the black market would grow if more individuals were able to possess eagle feathers.¹⁶⁶ Instead, the court noted that "it is also possible to hypothesize that the black market exists precisely because sincere adherents to American Indian religions cannot otherwise obtain eagle feathers."¹⁶⁷ Fourth, the court found that since the statute already contains an extensive provision for issuing permits for "other interests," it is likely not adverse to the statute's goal of allowing an exception for a religious person.¹⁶⁸ Further, the court found that, to accomplish the same objectives, there are other possible means to enforce the Eagle Protection Act.¹⁶⁹ One such alternative was for individuals possessing eagle feathers to hold a permit, which would prove their legality.¹⁷⁰ Finally, the court found that the government's argument that

159. *Id.* at 1293-94.

160. *Id.* at 1290.

161. *Id.* at 1295.

162. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 476 (5th Cir. 2014).

163. *Id.* at 477.

164. *Id.* at 476.

165. *Id.*

166. *Id.* at 477.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

agents would have to be “religious police” was not supported by evidence.¹⁷¹ The court found that persons wishing to possess eagle feathers for religious purposes could “demonstrate their religious need for eagle feathers.”¹⁷²

The Fifth Circuit also discounted the government’s argument that opening up the Repository to all persons for religious purposes, regardless of whether they are members of a federally recognized tribe, would not advance the government’s interest in fulfilling its responsibilities to federally recognized tribes.¹⁷³ The court found there was not sufficient evidence to establish that the Repository would be overwhelmed by requests and that the government would not be able to continue fulfilling its responsibilities to tribes.¹⁷⁴

B. Ramifications of Hobby Lobby’s Least Restrictive Means Standard

A second decisive distinction between *Wilgus* and *McAllen Grace* is the emergence of the Supreme Court’s decision in *Hobby Lobby*. The Supreme Court decided *Hobby Lobby* in June 2014¹⁷⁵ and the Fifth Circuit decided *McAllen Grace* less than two months later in August 2014.¹⁷⁶ The Fifth Circuit in *McAllen Grace* relied heavily on the Supreme Court’s reasoning in *Hobby Lobby*.¹⁷⁷

Where the government’s argument in *Wilgus* was sufficient for the Tenth Circuit to find the government’s implementation of the Eagle Protection Act was the least restrictive means,¹⁷⁸ the government’s argument in *McAllen Grace* was not sufficient.¹⁷⁹ In *Hobby Lobby*, the Supreme Court found that the alternative proposed by the plaintiffs would still advance the government’s interest in providing contraceptives to women cost-free.¹⁸⁰ The alternative was for the federal government to pay for the contraceptives rather than mandating that businesses with religious objections pay.¹⁸¹ The existing exception provided for the government to pay for contraceptives of employees of religious non-profits or churches who religiously object to providing these contraceptives to their employees.¹⁸² Thus, the Court found that the government could also pay for the contraceptives for the employees of for-profit closely held businesses to advance its compelling interest in providing contraceptives to women without cost.¹⁸³

Relying on this understanding, the Fifth Circuit in *McAllen Grace* found that

171. *Id.*

172. *Id.*

173. *Id.* at 478.

174. *Id.*

175. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

176. *McAllen Grace*, 764 F.3d 465.

177. *Id.* at 475-76.

178. *United States v. Wilgus*, 638 F.3d 1274, 1296 (10th Cir. 2011).

179. *McAllen Grace*, 764 F.3d at 480.

180. *Hobby Lobby*, 134 S. Ct. at 2782.

181. *Id.*

182. *Id.*

183. *Id.*

the presence of exceptions under the Eagle Protection Act demonstrated that the government was able to advance its compelling interests with the presence of exceptions.¹⁸⁴ The court found that a less restrictive means for advancing its compelling interests existed by allowing the plaintiffs to possess eagle feathers for religious purposes.¹⁸⁵

The Fifth Circuit further found that the alleged government harm was one of its own making because the Repository runs inefficiently.¹⁸⁶ The court referred to *Hobby Lobby* to hold that the government “cannot infringe on [an individual’s] rights by creating and maintaining an inefficient system and then blaming those inefficiencies for its inability to accommodate [the individual].”¹⁸⁷ The court noted that other circuits that have found the Eagle Protection Act does not violate RFRA “have done so in contexts not assessing the questions of whether the government’s own inefficiencies can be considered ‘the least restrictive means’ and whether other avenues that put the burden on plaintiffs (like collecting feathers from zoos) would be less restrictive.”¹⁸⁸

The Fifth Circuit, however, failed to recognize the differences between the resources in *Hobby Lobby* and in *McAllen Grace*.¹⁸⁹ Providing eagle feathers for non-FRT members is distinguishable from providing contraceptives for employees in *Hobby Lobby*. Eagle feathers are a limited resource.¹⁹⁰ If more individuals are able to obtain eagle feathers from the eagle repository, there will be less eagle feathers.¹⁹¹ There is already a six-month waiting period to receive eagle feathers from the Repository.¹⁹² Any increase in the applications for eagle parts would make less available for federally recognized tribes. In *Hobby Lobby*, there was not a resource scarcity problem.¹⁹³ If the exception to providing contraceptives was expanded to closely held businesses, it would not impose upon the government’s compelling interest of providing contraceptives cost-free because the government could also pay for them.¹⁹⁴ However, if the permitting process under the Eagle Protection Act were expanded, then FRT members would be prevented or delayed in receiving their feathers.¹⁹⁵ The burden would then shift from the non-FRT members to FRT members.¹⁹⁶ This would directly impede the

184. *McAllen Grace*, 764 F.3d at 477.

185. *Id.*

186. *Id.* at 479.

187. *Id.*

188. *Id.*

189. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *McAllen Grace*, 764 F.3d 465.

190. *United States v. Wilgus*, 638 F.3d 1274, 1291 (10th Cir. 2011).

191. *Id.* at 1294.

192. *McAllen Grace*, 764 F.3d at 470.

193. *Hobby Lobby*, 134 S. Ct. at 2782.

194. *Id.*

195. *Wilgus*, 638 F.3d at 1293.

196. *See Kathryn E. Kovacs, Hobby Lobby and the Zero-Sum Game*, 92 WASH. U. L. REV. 255, 267 (2014) (“Providing an exemption to people who are not members of federally recognized

government's compelling interest of fulfilling responsibilities to federally recognized tribes.¹⁹⁷

This scarcity could also lead to a natural resources problem if individuals take it upon themselves to possess eagle feathers through illegal means, including poaching.¹⁹⁸ A line must be drawn somewhere.

C. Stage of Litigation

An additional distinction between the two cases is the stage of litigation in which the courts decided the cases.¹⁹⁹ The Tenth Circuit in *Wilgus* decided the issue after more than a decade of pending litigation.²⁰⁰ The Tenth Circuit reversed the district court's decision that the Eagle Protection Act was not the least restrictive means to advance the government's compelling interests.²⁰¹ This decision was based on a complete record after the hearings had taken place.²⁰² The Fifth Circuit, on the other hand, decided *McAllen Grace* on an appeal from a motion for summary judgment to the district court.²⁰³ In fact, the Fifth Circuit recognized the difference, noting that *Wilgus* involved "in most instances much better-developed records."²⁰⁴ After the Fifth Circuit rejected the government's arguments that the existing regulation of the Eagle Protection Act was the least restrictive means of furthering the government's compelling interests, the court remanded the case for the government to establish a better record and evidence in support of its position.²⁰⁵ The court stated that the government must provide actual evidence of how the eagles would be harmed and how many non-members wishing to possess eagle feathers for religious purposes would apply for a permit.²⁰⁶ The government needed to prove, with specific evidence, that the alternatives would not advance the government's compelling interests.²⁰⁷

Indian tribes would not simply alleviate their religious burden; instead, it would shift their religious burden to tribal members. RFRA requires the government to pursue its compelling interests using the means that are least restrictive of religious exercise; it does not require the government to shift those burdens from person to person. Thus, even after Hobby Lobby, challenges to the Eagle Act under RFRA should continue to fail.”).

197. *Wilgus*, 638 F.3d at 1293.

198. *Id.* at 1294.

199. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 472 (5th Cir. 2014); *Wilgus*, 638 F.3d 1274.

200. *Wilgus*, 638 F.3d at 1296.

201. *Id.*

202. *Id.* at 1277.

203. *McAllen Grace*, 764 F.3d at 472.

204. *Id.* at 479.

205. *Id.* at 480.

206. *Id.* at 478.

207. *Id.* at 479.

III. HOW ANALOGOUS IS THE FEDERALLY RECOGNIZED TRIBE EXCEPTION IN THE EAGLE PROTECTION ACT TO A RELIGIOUS EXCEPTION?

The Fifth Circuit in *McAllen Grace* conflates religion and politics when determining the government's compelling interest in protecting the "religious purposes of Indian tribes."²⁰⁸ The Fifth Circuit provided, "Given the fact that Congress did not define 'Indian tribes' in this particular section, and the fact that the Department's approach has not been entirely uniform on this, we cannot definitively conclude that Congress intended to protect only federally recognized tribe members' religious rights in this section."²⁰⁹ FWS, however, did limit protection only to federally recognized tribes, and that interpretation is entitled to deference under *Chevron*.²¹⁰

The Eagle Protection Act is clear that Congress's purpose in including the phrase "for the religious purposes of Indian tribes" was to respect the quasi-sovereign federally recognized Indian tribes, not to recognize the religion of those who practice a "Native American religion."²¹¹ Even if there is ambiguity in the Eagle Protection Act, the Fifth Circuit should have deferred to FWS's interpretation under *Chevron*. This interpretation shows that there are no less restrictive means to further this compelling interest, contrary to the Fifth Circuit's interpretation.

A. The Fifth Circuit Should Have Performed a Chevron Analysis

FWS has interpreted "for the religious purposes of Indian tribes" in the Eagle Protection Act to indicate for the religious purposes of federally recognized tribes.²¹² The Fifth Circuit, however, declined to accept FWS's interpretation and instead recognized ambiguity in the statute.²¹³ To qualify for *Chevron* deference, the court first must determine whether "Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."²¹⁴ If the rules do carry the force of law, the court should move through the *Chevron* analysis.²¹⁵ The Supreme Court in *Chevron* provides the standard courts should apply when reviewing an agency's interpretation of a statute it administers:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . If, however, the court determines Congress has not

208. *Id.* at 473-76.

209. *Id.* at 473.

210. *See Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

211. S. REP. NO. 87-1986, at 6 (1962).

212. 50 C.F.R. § 22.22 (a)(5) (2014).

213. *McAllen Grace*, 764 F.3d at 473.

214. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

215. *Id.*

directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.²¹⁶

1. FWS Regulations Carry the Force of Law.—The regulations promulgated in section 22.22 of title 50 of the Code of Federal Regulations carry the force of law.²¹⁷ First, Congress delegated authority to the Secretary of the Interior to promulgate regulations determining whether exceptions should be made under the Eagle Protection Act.²¹⁸ Pursuant to this authority, the Secretary of the Interior promulgated regulations regarding “the requirements concerning permits for Indian religious purposes.”²¹⁹ The Supreme Court established that the “agency’s power to engage in . . . notice-and-comment rulemaking” indicates that the rules promulgated in that power carry the force of law.²²⁰ Thus, the Secretary of the Interior’s interpretation of the exception in 16 U.S.C. § 668a “for religious purposes of Indian tribes” carries the force of law because it was promulgated under notice-and-comment rulemaking.²²¹ The interpretation is entitled to the *Chevron* deference.²²²

2. Congress Intended the Eagle Protection Act to Accommodate Federally Recognized Tribes.—Congress intended the exception “for the religious purposes of Indian tribes” to accommodate federally recognized tribes.²²³ To determine what the intent of Congress was in a statute, courts look to the statute’s plain meaning and its legislative history.²²⁴ A plain reading of the Eagle Protection Act shows that the Secretary of the Interior may permit the taking of eagle feathers “for the religious purposes of Indian tribes.”²²⁵ Unfortunately, the only instance the phrase “for the religious purposes of Indian tribes” appears in federal statutes is in the Eagle Protection Act.²²⁶ The Fifth Circuit found ambiguity in the phrase “Indian tribes.”²²⁷

However, a thorough evaluation of the phrase “Indian tribes” shows the intent of Congress was clear. First, courts should look at the plain meaning of the phrase “Indian tribe.” The phrase “Indian tribe” is not located in the Merriam-Webster Dictionary. However, Black’s Legal Dictionary defines “Indian tribe” as:

216. *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

217. 50 C.F.R. § 22.22.

218. 16 U.S.C. § 668(a) (2012).

219. 50 C.F.R. § 22.22.

220. *Mead Corp.*, 533 U.S. at 227.

221. 50 C.F.R. § 22.22.

222. *See Mead Corp.*, 533 U.S. at 226-27.

223. 16 U.S.C. § 668(a).

224. *Id.*

225. *Id.*

226. *Id.*

227. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 473 (5th Cir. 2014).

A group, band, nation, or other organized group of indigenous American people . . . that is recognized as eligible for the special programs and services provided by the U.S. government because of Indian status . . . [especially], any such group having a federally recognized governing body that carries out substantial governmental duties and powers over an area.²²⁸

Black's Dictionary also includes a quote from William C. Canby Jr. warning that "there is no all-purpose definition of an Indian tribe . . . Definitions must accordingly be used with extreme caution."²²⁹ Other federal statutes have attempted to define "Indian tribe," but have not been consistent in their definition.²³⁰ The definition in Black's Legal Dictionary clearly shows that "Indian tribe" is best interpreted as a federally recognized tribe, so the Fifth Circuit should have deferred to FWS's interpretation of the same. Even if the dictionary definition of "Indian tribe" is ambiguous, a look at the Constitution and legislative history further uncovers Congress's intention.

In the United States Constitution, the founders acknowledged federally recognized tribes as having a special status.²³¹ The Tenth Circuit in *Wilgus* identified that "[a]long with Congress's power to 'regulate Commerce . . . with the Indian Tribes' [in article I, section 8 of the Constitution] comes an obligation of trust to protect *the rights and interests of federally recognized tribes* and to promote self-determination."²³² The founders recognized the sovereignty of Indian tribes similar to the sovereignty of foreign nations and states.²³³ Further, "Congress has 'plenary power' to legislate concerning the tribes, springing from both the Indian Commerce Clause of Article I of the Constitution, U.S. Const. art. I, § 8, cl.3, and the treaty power of [Art II, § 2, cl.2]."²³⁴ Pursuant to this power and responsibility to tribes, the Supreme Court has held that Congress has the power to "single out for special treatment a constituency of tribal Indians."²³⁵

The legislative history of the exception further indicates that Congress intended to provide a political accommodation to federally recognized tribes rather than an accommodation for religious purposes.²³⁶ In amending the Eagle Protection Act to include the exception "for the religious purposes of Indian tribes," the Committee on Commerce submitted a report indicating the need for the exception.²³⁷ The report recognized that eagle "feathers are an important part

228. *Indian Tribe*, BLACK'S LAW DICTIONARY (10th ed. 2014).

229. *Id.*

230. 25 U.S.C. §§ 450b(e), 479a-1(a) (2014); 42 U.S.C. § 13743 (2014).

231. U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. II, § 2, cl. 2.

232. *United States v. Wilgus*, 638 F.3d 1274, 1285 (10th Cir. 2011) (quoting *United States v. Hardman*, 297 F.3d 1116, 1128 (10th Cir. 2002) (en banc) (emphasis in original)).

233. U.S. CONST. art I, § 8, cl. 3.

234. *Wilgus*, 638 F.3d at 1286 (citing *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974)).

235. *Morton*, 417 U.S. at 552.

236. *See* S. REP. NO. 87-1986, at 3-4.

237. *Id.*

of Indian religious rituals.”²³⁸ This conclusion followed the submission of the Secretary of Interior’s agency report.²³⁹ The agency report indicated that “[t]he golden eagle is important in enabling many Indian tribes . . . to continue ancient customs and ceremonies that are of deep religious or emotional significance to them.”²⁴⁰ The report focused on providing accommodation for American Indian tribes instead of providing a religious exception.²⁴¹ The report only mentioned the importance of eagle feathers in religious practices of American Indian tribes, even though other religious traditions use eagle feathers in their religious practices.²⁴² By excluding from the conversation other religious traditions, Congress intended to provide a political accommodation for American Indian tribes rather than a religious exception. Because Congress’s intent to provide an exception only for federally recognized tribes is clear, the Fifth Circuit should have accepted the government’s argument.

3. The Court Should Defer to FWS’s Implementation of the Eagle Protection Act.—Even if the Fifth Circuit finds there is ambiguity in the exception, FWS is entitled to deference. The Fifth Circuit should accept FWS’s interpretation of the exception for federally recognized tribes because FWS’s interpretation is reasonable.²⁴³ Here, FWS defined “Indian tribes” to indicate those tribes “federally recognized under the Federally Recognized Tribal List Act of 1994, 25 U.S.C. 479a-1.”²⁴⁴ FWS interprets this exception as primarily a political accommodation for federally recognized tribes.²⁴⁵ FWS’s interpretation is reasonable in light of the federal government’s history of a unique government-to-government relationship with federally recognized Indian tribes and the potential Establishment Clause problems had Congress instead intended a religious exception.

As discussed in the first step, FWS’s interpretation is reasonable in light of the Constitution’s special status afforded to Indian tribes.²⁴⁶ The United States Supreme Court has further recognized the special trust relationship between the federal government and Indian tribes: “Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, [the federal government] has charged itself with moral obligations of the highest responsibility and trust.”²⁴⁷

Courts also find historical precedent important when determining whether an

238. *Id.*

239. *Id.* at 5-7.

240. *Id.* at 6.

241. *Id.* at 5-7.

242. *United States v. Wilgus*, 638 F.3d 1274, 1294 (10th Cir. 2011) (explaining that eagle feathers are also important to some Afro-Caribbean religions).

243. *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

244. 50 C.F.R. § 22.22 (a)(5) (2014).

245. Kovacs, *supra* note 196, at 106.

246. U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. II, § 2, cl. 2.

247. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

agency's interpretation of a statute is reasonable.²⁴⁸ Presidents of the United States have recognized the importance of the federal government's relationship with federally recognized tribes and how the exception in the Eagle Protection Act provides an accommodation for political purposes.²⁴⁹ In a memorandum sent to the heads of executive departments and agencies, President Clinton stressed the importance of recognizing the governments of federally recognized tribes:

Today, as part of an historic meeting with all federally recognized tribal governments, I am directing executive departments and agencies (hereafter collectively 'agency' or 'agencies') to work cooperatively with tribal governments and to reexamine broadly their practices and procedures to seek opportunities to accommodate Native American religious practices to the fullest extent under the law.²⁵⁰

President Clinton recognized a duty to federally recognized tribal governments, not necessarily an accommodation for the religious practices of all "American Indian religions."²⁵¹ Thus, it is permissible for FWS to interpret the Eagle Protection Act as providing exceptions only to federally recognized tribes rather than providing exceptions for religious purposes of individuals not members of federally recognized tribes.

In his Special Message on Indian Affairs, President Nixon also recognized the important relationship between the federal government and federally recognized Indian tribes:

The special relationship between Indians and the Federal government is the result of solemn obligations which have been entered into by the United States Government . . . [T]he special relationship . . . continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American.²⁵²

President Nixon recognized the importance of accommodating federally recognized tribes as an obligation of the federal government.²⁵³

Congress's intent for the exception to be more like a political accommodation for federally recognized tribes rather than a religious exception also avoids potential Establishment Clause problems that would arise if it were a religious exception.²⁵⁴ The Establishment Clause of the First Amendment to the

248. See *Ghaleb Nassar Al-Bihani v. Obama*, 619 F.3d 1, 51 (D.C. Cir. 2010).

249. Policy Concerning Distribution of Eagle Feathers for Native American Religious Purposes, 59 Fed. Reg. 22,953 (Apr. 29, 1994).

250. *Id.*

251. *Id.*

252. Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 213 (July 8, 1970), available at <http://www.presidency.ucsb.edu/ws/?pid=2573> [<http://perma.cc/K6YU-R8NC>].

253. *Id.*

254. *United States v. Wilgus*, 638 F.3d 1274, 1287-88 (10th Cir. 2011); Kovacs, *supra* note 196, at 108-11.

Constitution directs that “Congress shall make no law respecting an establishment of religion.”²⁵⁵ Had Congress intended to protect generally the practices and individuals of all “American Indian religions,” it would be favoring the “American Indian religions” over other religions. The Supreme Court has established that the government may not favor one religion over another.²⁵⁶ Surely, Congress did not intend to violate the Establishment Clause when drafting this exception. The Tenth Circuit in *Wilgus* warned against adopting an interpretation that favored a more general “protection of Native American religion.”²⁵⁷ The court warned, “[i]f [the court] were to hold that the federal government has a compelling interest in fostering Native American culture generally by providing special exceptions to criminal laws for Native American religious practices, we are concerned this might run up against [the Establishment Clause].”²⁵⁸

The recognition of federally recognized tribes is not the same as the recognition of a specific religion.²⁵⁹ The Supreme Court has established that federally recognized tribes are political entities rather than religious or racial entities.²⁶⁰ Federally recognized tribes are distinct from religions.²⁶¹ Had the exception in the Eagle Protection Act provided an exception for the religious purposes of the Roman Catholic Church, it would clearly run afoul of the Establishment Clause. Instead, federally recognized tribes are political and Congress is permitted to accommodate them based on their government-to-government relationship.²⁶² It is thus, at the least, a permissible interpretation under the Eagle Protection Act for FWS to provide a political accommodation for federally recognized tribes rather than an accommodation for one religion.²⁶³

CONCLUSION

The Supreme Court in *Hobby Lobby* “clarified how heavy the burden is on the [government] to demonstrate that the regulatory framework is the least restrictive means” in a RFRA analysis.²⁶⁴ Yet the Eagle Protection Act should still survive RFRA scrutiny post-*Hobby Lobby*.

Under *Hobby Lobby*, the proposed alternatives furthered the government’s compelling interests.²⁶⁵ The alternatives proposed to the Eagle Protection Act, on

255. U.S. CONST. amend. I.

256. *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005).

257. *Wilgus*, 638 F.3d at 1287.

258. *Id.*

259. *See Morton v. Mancari*, 417 U.S. 535, 554 (1974).

260. *Id.*

261. *Id.*

262. *Wilgus*, 638 F.3d at 1286-88.

263. *Id.* at 1287-88; *see Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

264. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 479 (5th Cir. 2014).

265. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2782 (2014).

the other hand, do not advance the government's compelling interests of protecting eagles and fulfilling responsibilities to federally recognized tribes.²⁶⁶ By expanding the permitting process to all religious people, there would be less feathers available to the federally recognized tribes.²⁶⁷ Unlike the interest in *Hobby Lobby*, eagle feathers are a limited resource.²⁶⁸ Any increase in permits would fail to advance the government's compelling interest of fulfilling responsibilities to federally recognized tribes.²⁶⁹

The Fifth Circuit in *McAllen Grace* recognized the Eagle Protection Act as simply providing feathers to tribe members for individual religious beliefs.²⁷⁰ However, the exception for Indian tribes does much more than provide a commodity for religious practices. The exception instead demonstrates the federal government's duty to the quasi-sovereign federally recognized tribes.²⁷¹ The federal government recognized the special status of federally recognized tribes as sovereign states in the Eagle Protection Act.²⁷²

By failing to recognize this important relationship between the federal government and federally recognized tribes, the Fifth Circuit found a less restrictive means of furthering what it saw as the government's compelling interest.²⁷³ If the Fifth Circuit, however, properly deferred under *Chevron* to FWS's interpretation of providing an exception to recognize the special status of tribes as sovereign states, then the Fifth Circuit would have been unable to find a less restrictive means of furthering this special political and cultural exception. The Fifth Circuit should have recognized the exceptions provided for in the Eagle Protection Act were based on political motivations and thus different than the exceptions provided for in the ACA that were based on individual religious beliefs. These distinctions show that the emergence of *Hobby Lobby* should not alter the court's examination of the Eagle Protection Act under RFRA.

266. *Wilgus*, 638 F.3d at 1292-95.

267. *Id.* at 1293.

268. Kovacs, *supra* note 196, at 267.

269. *Id.*

270. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 478 (5th Cir. 2014).

271. S. REP. NO. 87-1986, at 5-7.

272. *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

273. *See McAllen Grace*, 764 F.3d 465.